No. 10,950.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and William Donoho,

Appellees.

APPELLANTS' REPLY BRIEF.

CLAUDE F. WEINGAND,
939 Rowan Building, Los Angeles 13,
Attorney for Appellants.

FILED
APR 10 1945
PAUL P. O'BRIEN,
CLERK

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statute.

No. 10,950.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and William Donoho,

Appellees.

APPELLANTS' REPLY BRIEF.

I.

Reply to Appellee's Point I.

(a) GENERAL PRINCIPLES.

Nothing is further from the minds of appellants than to dispute the statement of "General Principles" which the appellee sets out under Point I (a) of his argument. The principle that administrative action is presumed to be correct and that administrative findings of fact will not be disturbed if they are supported by evidence is too well entrenched to be made the basis of this appeal. The claim advanced simply is that in spite of the presump-

tions that are applied by reviewing courts in connection with appeals from administrative action, *the necessary minimum of evidence has not been adduced in this case.*

Appellee will concede as readily as we are willing to concede his statement of general principles that findings of fact which are not supported by evidence or awards which are not supported by the findings of fact must be set aside in the event of a review.

(b) The Material Findings of Fact.

We, of course, admit that the applicant suffers from tuberculosis; we admit the description of the conditions under which the applicant had to work, and we also concede that they were strenuous and trying. But are these facts sufficient evidence that the employment of the applicant was *the cause* of his disability and that the disease or infection arose "naturally out of such employment"?

The applicant's testimony with respect to possible exposure to, or contact with, tuberculosis is based entirely on surmise. Could it be said that the fact that one of applicant's co-employees is "now" (at the time of the hearing) in a tuberculosis hospital possibly be dignified with any other label than conjecture as far as the source of applicant's disability is concerned, even if that other employee came in contact with the applicant on the boat that transported both of them to Samoa, or even if the other individual drove a truck, and even though the other individual came in contact with the applicant in the mess hall or on casual visits?

Can it be said to be more than conjecture and surmise that "tuberculosis among the natives *might* be common"; or that there is another employee whose condition "claim-

ant understood was diagnosed as tuberculosis," even though applicant came in contact with him in the mess hall or in the cabin?

Is it more than conjecture or surmise to say that "claimant heard that several others broke down"?

A reference to page 8 of appellee's brief, in which we may safely assume he puts his best foot forward as far as the evidence is concerned, will not reveal any better or additional statements than those reproduced here. This is indeed a shaky premise for appellee's conclusion as to the origin of applicant's tuberculosis.

The same observation can be made with respect to the medical testimony found on page 9 of appellee's brief. It is even more vague than that of the applicant. It is indeed so vague that under subdivision (c) of Point I of his brief the Deputy Commissioner states that he does not feel himself bound by the opinion of any medical examiner and that he may form his own impression with respect to the medical evidence.

(c) Appellee's Power to Judge Medical Questions Is Not Arbitrary.

Now, it is, of course, true that a Commissioner who sees a disabled limb may form his own impression as to the degree of permanent impairment (such being the case in *Joyce v. U. S. Deputy Commissioner,* 33 Fed. (2d) 218 (D. C. Me., 1929)); or that the Deputy Commissioner may, where the fact of fracture is undisputed, decide that it was the fracture which produced the resultant disability of the applicant to perform useful work (as was the case in *Jarka Corp. v. Norton,* 56 Fed. (2d) 287 (D. C. Penn.,

1930)); or that he may choose between conflicting medical theories of disability (as was the case in *Kranski v. Atl. Coast Shipping*); or that he may determine that a man is totally disabled from following the duties of a longshoreman or any *like occupation,* although there was medical testimony to the effect that the applicant could pursue a vocation requiring not much lifting or walking (*Zurich General Accident & Liability Ins. Co. v. Marshall,* 42 Fed. (2d) 1010 (D. C. Wash., 1930)); but these examples just about exhaust the field in which the Deputy Commissioner can supplant, by his own impressions, the medical testimony offered. It is a far different claim which appellee makes here. He claims to have the right *in the absence of any competent medical testimony to say by looking at a man* HOW OR IN WHAT MANNER OR UNDER WHAT CIRCUMSTANCES AND CONDITIONS ACTIVE TUBERCULOSIS WAS CONTRACTED.

It is conceded that evidence of causal relationship need not be positive and unequivocal, but on the other hand, it must not rest on conjecture and speculation.

(d) WHAT IS MEANT BY "INJURY" UNDER THE ACT?

The claim is too readily made that since the statute has to be liberally construed, the Deputy Commissioner's action should be free from scrutiny. His liberality should be as broad as the purpose of the statute, but no broader. Neither sympathy nor unusual circumstances can justify a conversion of the act which requires that the disease or infection *arise naturally out of the employment* into a statute which says that whenever a man gets sick while he is on a job, he is entitled to an award under the Longshoremen's Compensation Act. It has been held, as ap-

pellee aptly points out, that the Longshoremen's Compensation Act includes "such occupational disease or infection as arises naturally out of such employment," but where is the evidence in this case on which the Deputy Commissioner could conclude that tuberculosis arises naturally out of driving a truck on the Island of Samoa, or working in a mess hall, or going once a week into an infirmary where measles are treated?

The examples which appellee cites under subheading (d) of his Point I do not support his claim and are readily seen to be different. Where it is an established fact that on a ship several cases of spinal meningitis had occurred and that the patients suffering from that disease were on the ship when the employee went on board, the causal connection between the employee's contracting spinal meningitis and the existence of the disease on the ship is easily seen and quite different from the surmises previously referred to from which the Deputy Commissioner is supposed to have derived a causal connection in the case at bar. It is likewise natural to expect that a man who is continually required to inhale copper ore dust may contract bronchiectosis; or that a man continually exposed to the cooling rooms of an ice cream factory might by reason thereof contract thrombo-angitis obliterans; or that a man who is compelled to over-exert himself over a long period of time might suffer a nervous breakdown. (These are samples of appellee's authorities.) But it does not follow that in the absence of medical evidence the Commissioner should have the power to find that a sojourn of less than a year on the Island of Samoa under tropical conditions is a natural circumstance from which tuberculosis results.

We have purposely analyzed only a few of the cases on pages 12 and 13 of appellee's brief. The rest of them will easily be seen to fall into the same pattern.

The case of *Grain Handling Co., Inc. v. McManigal* has already been discussed in our opening brief and its plain difference from the case at bar has been there pointed out.

On page 16, we are referred to the case of *Lockheed Overseas Corp. v. Pillsbury,* 52 F. Supp. 997 (D.C.S.P. D. Cal., 1943). The analogy between the case at bar and that case consists solely in the fact that the Defense Bases Act is involved in both, and that the illness involved in both is tuberculosis, but at that point the analogy ceases. To establish that very plainly we shall quote from the District Court's statement of facts in the *Lockheed* case, which is as follows:

> "* * * Defendant Strand on or about May 19, 1942, after a pre-employment X-ray examination by complainant Lockheed *which showed healed pulmonary pathology or quiescent pulmonary tuberculosis,* was employed by complainant Lockheed Overseas Corporation (hereinafter called Lockheed). Defendant Strand had been working continuously for Lockheed Corporation since January, 1941, as a gee man in tooling. He had passed his physical examination for entrance into the Navy just before his pre-employment X-ray examination by Lockheed. Strand was thereafter sent outside of the continental United States by Lockheed to work at a military base situated near Great Britain. While en route to said base he sustained a heavy cold aboard ship, which was caused and aggravated by crowded conditions aboard the vessel and the prevalence of respiratory infections

among the men rooming in such crowded quarters of the ship with Strand. Thereafter, in England, defendant Strand's cold became worse, due to changes in climate to which Strand was not accustomed, and inability of defendant's physicians at the base to make proper examination within reasonable time because of nonarrival of necessary equipment, and after arriving at a permanent military base where defendant worked digging ditches, carrying bags of cement in erecting pre-fabricated steel for houses; after about a week of this hard work he began to have pains about the chest and a feeling of fatigue. Subsequent examinations abroad by a physician employed by Strand revealed the presence of active pulmonary tuberculosis. This condition was subsequently confirmed by physical examinations of Strand upon his return to the United States, where he was returned by Lockheed upon his becoming disabled in Lockheed's employ overseas." (Italics ours.)

It would seem that no further discussion is required to distinguish the two cases.

Under the same subheading (d) of his brief, appellee contends that the California cases cited in support of appellant's position are not applicable because the Longshoremen's Act, so it is claimed, does not adhere to the "old" commonalty doctrine. It is to be inferred from the use of the adjective "old" that modern or progressive jurisprudence would require the abandonment thereof, in that it is not sufficiently liberal toward employees? Nobody would accuse the California Supreme Court of illiberality toward employees, and it would indeed be diffi-

cult to find a more liberal act toward employees than the California Labor Code. We gain the impression from reading appellee's discussion that the definition of the term "injury" in the Longshoremen's Act is one of extreme liberality and that in comparison the California definition is correspondingly restricted and practically tailored to fit the "old" commonalty doctrine. Quite the contrary is true, however. The Longshoremen's Act requires that "infection" (admitting, for argument only, that infection need not be occupational) must arise "naturally" out of the employment, whereas, the California definition in Labor Code 3208 reads as follows:

> " 'Injury' includes any injury or disease arising out of the employment, including injury to artificial members."

We see, the California law even drops the qualifying adjective "naturally." Neither the statute therefore nor the attitude of the Supreme Court of California can be said to be stingy or miserly toward employees.

But whether the Longshoremen's Act does or does not recognize the "old" commonalty doctrine, and whether or not the "infection" referred to in the Longshoremen's Act must be occupational or not, it is plain beyond peradventure that even under it the infection must arise "naturally out of such employment" or must result "naturally or unavoidably * * * from such accidental injury." It therefore is still the fact and we may insist that a natural and causal relationship between the employment and the infection has to be shown.

We are surprised at appellee's reference to the case of *Burroughs Adding Machine Co. v. Dehn,* 110 Ind. App. 483, 39 N. E. 499, which appears on page 24 of his brief. The quotation would indicate that the Indiana Act contains *no requirement* that the accident arise out of the nature of the employment, but the Longshoremen's Compensation Act, on the other hand, contains that very requirement as abundantly appears from the discussion herein.

Appellee concedes that it must be the employment which exposes the employee to the risk (for instance, the discussion on page 23 of his brief), but again he fails to point out where the applicant's employment exposed him to the risk of tuberculosis. An abortive attempt to do so is made on page 28 where it is said that the contact with the natives, his work as a steward, his contact with fellow employees on the boat, at work or in the barracks were risks which he encountered because of his employment. But where is there any evidence aside from the surmise and conjecture already referred to that his work on Samoa brought him into contact with tuberculosis, that his daily trips to the hospital brought him in contact with tuberculosis, that the fellow employees on the boat en route to Samoa had tuberculosis, or that people he encountered in his work or in the barracks had tuberculosis? Whichever way we read the transcript, commencing on page 34 and ending with page 46, or the summary thereof on page 8 of appellee's brief, the indispensable prerequisite that applicant's employment brought him in contact therewith is lacking.

II.

Reply to Point II.

Appellee says under this heading that findings in the alternative are proper if either alternative will support the conclusion of law and the award. We ask, however, what if either alternative, or even one of them, is not supported by the evidence? The only possible finding with respect to the applicant's condition before he left for Samoa on the basis of a fluoroscopic examination was that he was not infected with tuberculosis so that we have a situation quite different from that presented in *Lockheed Overseas Corp. v. Pillsbury,* 52 Fed. Supp. 997. If it is true that either finding supports the award, it is in the light of the foregoing discussion equally true that neither finding is supported by the evidence.

Conclusion.

It is, therefore, respectfully submitted that the award in favor of the applicant should be set aside.

Respectfully submitted,

CLAUDE F. WEINGAND,
Attorney for Appellants.